
Ellen McEwen

From: Jeff Martin <jmartin@co.yellowstone.mt.gov>
Sent: Tuesday, November 26, 2013 2:21 PM
To: tom@llewellynrealestate.com
Subject: FW: Re: Application of Mortgage Exemption
Attachments: Mortgage Exemption - Montana Attorney General Opinion - 1988.rtf

Tom,

I asked Mr. English to opine on our County policy in regards to mortgage exemptions. Let me know if you have questions.

Sincerely,

Jeff Martin
Yellowstone County
Clerk and Recorder
(406) 256-2787

Dear Mr. Martin:

On November 25, 2013, you requested the Yellowstone County Attorney's Office position on the conveyance of parcels created under the "mortgage exemption" to subdivision review, Section 76-3-201(1)(b) of the Montana Code Annotated. Below is a copy of the current Section and the Section prior to the 2003 Amendments.

From 1973 until 1988, it was the position of Yellowstone County that a parcel created under the mortgage exemption could not be conveyed unless foreclosed on by the holder of the mortgage. The mortgage had to be foreclosed on before the parcel could be conveyed. There was no authority for this position. Section 76-3-201(1)(b) of the Montana Code Annotated did not restrict the conveyance of a parcel created under the mortgage exemption. This interpretation added a restriction that did not exist in the Section.

From 1988 until 2003, it was the position of the County that a parcel created under the mortgage exemption could be conveyed regardless of whether the holder of the mortgage had foreclosed on it. The mortgage did not have to be foreclosed on before the parcel could be conveyed. This interpretation better conformed to what was written in Section 76-3-201(1)(b) of the Montana Code Annotated. The cause for this change though was not a thoughtful reading of the Section, but a Montana Attorney General's Opinion related to the Section that could be construed to support or not the free conveyance of a parcel created under the mortgage exemption. Attached is a copy of the opinion.

From 2003 until the present, it has been the position of the County that a parcel created under the mortgage exemption after 2003 cannot be conveyed unless foreclosed on by the holder of the mortgage, but a parcel created under the mortgage exemption prior to 2003 can be conveyed regardless of whether the holder of the mortgage had foreclosed on it. In 2003, the Legislature amended Section 76-3-201 to explicitly provide that a parcel created under the mortgage exemption could not be conveyed unless foreclosed on by the holder of the mortgage. The Section restricted the conveyance of a parcel. The amendment did not retroactively apply to parcels previously created under the mortgage exemption. The County is aware that there have been some district court decisions from the western part of the state to the contrary that the amendment retroactively applied to parcels created under the mortgage exemption prior to the

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amendment. The decisions are not binding precedent and frankly not well reasoned. They retroactively apply a requirement without any legal authority, without a retroactivity clause. They commit a statutory interpretation faux pas. They add a condition not contained in the Section. Prior to 2003, there was no legal authority to restrict the conveyance of a parcel created under the mortgage exemption.

If you have any questions, please contact me.

Sincerely yours,

Mark English
Deputy Yellowstone County Attorney
November 26, 2013

76-3-201. Exemption for certain divisions of land--fees for examination of division (2013)

(1) Unless the method of disposition is adopted for the purpose of evading this chapter, the requirements of this chapter may not apply to any division of land that:

- (a) is created by order of any court of record in this state or by operation of law or that, in the absence of agreement between the parties to the sale, could be created by an order of any court in this state pursuant to the law of eminent domain, Title 70, chapter 30;
- (b) subject to subsection (3), is created to provide security for mortgages, liens, or trust indentures for the purpose of construction, improvements to the land being divided, or refinancing purposes;
- (c) creates an interest in oil, gas, minerals, or water that is severed from the surface ownership of real property;
- (d) creates cemetery lots;
- (e) is created by the reservation of a life estate;
- (f) is created by lease or rental for farming and agricultural purposes;
- (g) is in a location over which the state does not have jurisdiction; or
- (h) is created for rights-of-way or utility sites. A subsequent change in the use of the land to a residential, commercial, or industrial use is subject to the requirements of this chapter.

(2) Before a court of record orders a division of land under subsection (1)(a), the court shall notify the governing body of the pending division and allow the governing body to present written comment on the division.

(3) An exemption under subsection (1)(b) applies:

- (a) to a division of land of any size;
- (b) if the land that is divided is not conveyed to any entity other than the financial or lending institution to which the mortgage, lien, or trust indenture was given or to a purchaser upon foreclosure of the mortgage, lien, or trust indenture. A transfer of the divided land, by the owner of the property at the time that the land was divided, to any party other than those identified in this subsection (3)(b) subjects the division of land to the requirements of this chapter.

(c) to a parcel that is created to provide security as provided in subsection (1)(b). The remainder of the tract of land is subject to the provisions of this chapter if applicable.

(4) The governing body may examine a division of land to determine whether or not the requirements of this chapter apply to the division and may establish reasonable fees, not to exceed \$200, for the examination.

76-3-201. Exemption for certain divisions of land (2001 Prior to 2003 Amendments)

(1) Unless the method of disposition is adopted for the purpose of evading this chapter, the requirements of this chapter may not apply to any division of land that:

- (a) is created by order of any court of record in this state or by operation of law or that, in the absence of agreement between the parties to the sale, could be created by an order of any court in this state pursuant to the law of eminent domain, Title 70, chapter 30;
- (b) is created to provide security for construction mortgages, liens, or trust indentures;

- (c) creates an interest in oil, gas, minerals, or water that is severed from the surface ownership of real property;
 - (d) creates cemetery lots;
 - (e) is created by the reservation of a life estate;
 - (f) is created by lease or rental for farming and agricultural purposes; or
 - (g) is in a location over which the state does not have jurisdiction.
- (2) Before a court of record orders a division of land under subsection (1)(a), the court shall notify the governing body of the pending division and allow the governing body to present written comment on the division.